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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1453

ZENITH RADIO CORPORATION AND
NATIONAL UNION ELECTRIC CORPORATION
Petitioners

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF SEMICONDUCTOR INDUSTRY ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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BRIEF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Semiconductor Industry Association submits this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Semiconductor Industry Association ("SIA") is a non-profit association which represents over fifty manufacturers of semiconductor devices, accounting for over 95% of all semiconductors fabricated in the United States. Revenues of the U.S. based industry reached $11.4 billion in 1986. These microelectronic devices are not only the heart of many emerging industries, such as telecommunications and personal computers, but also the key to the competitiveness of many traditional industries, such as automobiles and appliances.

Neither SIA nor any member company has a direct interest in the outcome of this litigation [1] and SIA takes no position as to whether petitioners could prove their case at trial. However, SIA and several of its member companies are involved directly with the antidumping laws of the United States both in the past and presently. SIA is concerned with what we believe is a misinterpretation by the Court of Appeals, and a misapplication of a 1916 Antidumping Act case, of this Court's antitrust decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. ____, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In the antidumping laws, Congress had a wholly different purpose and used very different language from that of the Sherman Act, 15 U.S.C. § 1. Nevertheless, the Court of Appeals believed that it was bound by this Court's decision, not only in the antitrust case, but also in considering petitioners' private action under the Antidumping Act of 1916, 15 U.S.C. § 72. If that decision below is allowed to stand, the legislative purposes as to dumping will almost certainly be frustrated.

[1] This brief is submitted by the Association and does not necessarily state fully the views of every member.

SIA's concern is magnified by reason of the facts that the separate dumping case decisions by both courts below were not before this court on certiorari; this court expressly limited its decision to the antitrust issues; and, in any case, the decision was a very close one (5-4). In view of the present importance of the antidumping laws, and the very limited number of judicial interpretations of the 1916 Act, the application of antitrust principles without careful consideration of the differences in the statutes will create serious confusion and raise obstacles to enforcement of the antidumping laws, to the detriment of the members of SIA and many other American companies.

SUMMARY OF ARGUMENT

1. The Court of Appeals' decision in favor of petitioners was not reviewed by this Court on certiorari and must remain standing.

2. This Court's decision on antitrust issues was not a mandate to the Court of Appeals applicable to the separate antidumping case.

3. The elements of antidumping and antitrust violations are different, making it inappropriate to apply this Court's antitrust case to the antidumping case.

4. The requisites of the 1916 Antidumping Act as to the fact of dumping and injury to the industry are virtually undisputed, and the issue of intent is supported by evidence at least sufficient to defeat summary judgment.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTIONS.

This case involves the propriety of the decision of the Court of Appeals for the Third Circuit that a "law of the case" created by this Court's 5-4 decision upon petitioners' antitrust action in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. ___, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), was also applicable to the petitioners' action under

the Antidumping Act of 1916, 15 U.S.C. § 72. The District Court had granted summary judgment in two separate decisions relating to petitioners' action under the Sherman Act and petitioners' action under the Antidumping Act of 1916, respectively. The Court of Appeals reversed both decisions in separate opinions, but reserved final judgment pending disposition of a petition for writ of certiorari to this court which was limited to the action under the Sherman Act. This Court's decision was likewise limited to the Sherman Act issue, and specifically to ". . . the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." 475 U.S. at ___, 106 S. Ct. at 1351, 89 L. Ed. 2d at 546.

On remand of this Court's Sherman Act decision, the Court of Appeals did not review its prior dumping decision, nor did it compare the standards of law or evidence applicable to the antitrust action, on the one hand and the dumping action on the other. Instead, it concluded that this Court had established a "law of the case" on the antitrust issue which was equally applicable to petitioners' antidumping action.

In view of the uncontroverted evidence in the record in the *Matsushita* litigation that the foreign manufacturers had been found by the United States Government to have violated the antidumping laws of the United States with respect to consumer electronic products, and in view of the fact that several of the same companies have recently been in violation of the dumping laws with respect to semiconductors, SIA and many of its member companies have a direct interest in preventing the Court of Appeals' decision from destroying effectively the important private antidumping remedy established by Congress. It is essential to eliminate any possible implication that this Court has, by its *Matsushita* decision, established the standards of law and proof applicable in 1916 Antidumping Act cases.

II. THE SUPREME COURT'S DECISION ON CERTIORARI IN THE SHERMAN ACT CASE IS INHERENTLY INAPPLICABLE TO THE SEPARATE ANTIDUMPING CASE, BOTH BECAUSE ONLY ANTITRUST ISSUES WERE REVIEWED AND BECAUSE THE ELEMENTS OF THE TWO STATUTES ARE NOT COMPARABLE.

In *Matsushita,* this Court appears to have held that,

(i) petitioners could not base their case upon a Japanese price conspiracy because American antitrust laws do not regulate foreign competitive conditions;

(ii) petitioners could not rely upon proof that the Japanese manufacturers conspired to maintain minimum prices in U.S. markets because, although that would be an antitrust violation, petitioners would not have been damaged thereby;

(iii) petitioners could not rely upon non-price restrictions such as the "five-company rule", or "check prices," even though they are harmful to competition, because they would actually benefit competitors; and

(iv) evidence of these conspiracies, which could not be the basis for petitioners' action directly, could not be viewed as "direct evidence" of a conspiracy sufficient to overcome principles established in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed. 2d 775 (1984), that a conspiracy cannot be inferred from activity which is as consistent with independent action as with conspiracy in the absence of some direct evidence of conspiracy.

SIA respectfully submits that the decision of this Court relating to very important principles of antitrust law should not be automatically applied outside of the antitrust context, particularly when the Court was sharply divided. Although this

proposition would appear to be self-evident, it is particularly applicable because of the essential differences between the elements of violations of antitrust laws and antidumping laws.

No attempt is here made to elaborate on all these differences since no case has been found even discussing the potential comparison of elements of these respective statutes. Moreover, the District Court decided the cases separately; the Court of Appeals decided the cases separately; and this Court was not presented with the antidumping issue and did not attempt to deal with it. If the essential elements of antitrust cases and antidumping cases are to be made identical, a decision to do that should be made expressly after careful comparison of the language and purposes of each statute. The status of the current case seems to require that this be done by a decision of this Court, or by a mandate addressed to the Court of Appeals to reinstitute its prior decision in the antidumping case in favor of petitioners. The petitioners should be allowed a trial on the dumping case which was denied them by summary judgment but was ordered by the Court of Appeals' first decision which was not reviewed by this Court.

The difference in the 1916 Act is evident on its face. Whereas this Court in *Matsushita* determined that petitioners must prove a conspiracy to monopolize the American market for television receivers in order to establish an antitrust violation, in a dumping context petitioners need only prove the fact of dumping (done independently or by conspiracy) with intent to injure or destroy an American industry. The record indicates that the dumping was already proved by United States Government action. For purposes of the 1916 Antidumping Act, the American industry did not have to be destroyed, or virtually so, as might be required to establish a monopoly. "Injury" to the American industry is a sufficient basis for a private action under the 1916 Act, and the record is replete with evidence that the American television receiver industry was in fact injured.

A second difference is that the antitrust laws relate to interstate and foreign commerce of the United States and activity in foreign nations is relevant only where it impinges upon such commerce. Dumping, on the other hand, originates

in a foreign market and by definition relates to costs and pricing in that market. The standard for dumping established by the dumping laws is a foreign market value with sales at lower prices into the United States market. The violation can be individual, or it can be as a result of a conspiracy of the foreign manufacturers. Neither intent to monopolize nor predatory pricing need be established. Although evidence of predatory pricing in the antitrust sense would certainly be a basis for finding intent to injure, as the Court of Appeals decided, the absence of predation as defined in antitrust cases does not mean that there is not an intent to sell below foreign market value and to injure an American industry. Thus, this Court's finding concerning predatory pricing in the antitrust context should not even be relevant, let alone binding, in a 1916 Act case.

A further difference is that in the *Matsushita* decision, this Court found that petitioners were not injured by a violation of the antitrust laws. In contrast, in the dumping case, the record shows a violation of the dumping laws, plus the requisite injury to both the American industry and to the petitioners. The only remaining element needed for petitioners to establish their case is that of "intent." The requisite intent under the Antidumping Act of 1916 is not an intent to conspire or an intent to monopolize nor is it necessarily the standard of intent relevant in antitrust cases.[2] It is an intent to injure an American industry which is relevant under the 1916 Act. Intent is not usually proved by direct evidence but by inferences from other evidence. The courts have great experience with the antitrust laws, and perhaps this Court could draw the conclusions set forth in the opinion of the majority as to the motivations and the business considerations of competitors with respect to pricing conspiracies. Drawing inferences as to the intent, objectives and motivations with respect to dumping considerations is a different matter, particularly those of foreign manufacturers from a different culture. In the absence of a significant amount of litigation on the issue of intent to injure under the 1916 Antidumping Act, conclusions of the courts in antitrust cases concerning the much debated issues of presumptions of con-

[2] This Court did not address itself directly to an "intent" issue in its *Matsushita* decision.

spiracy arising from parallel action in pricing should not be superimposed upon the antidumping statutes.

For Sherman Act cases, the requisite proof (or presumptions) must be of a conspiracy to monopolize or to fix prices, presumably common prices or a minimum or maximum. In the dumping context, the prices need not be agreed upon at all—a violation under this statute can result from an agreement or conspiracy, parallel action independently arrived at, or even wholly independent action. Even in the conspiracy context, a violation of the 1916 Act could result from a joint enterprise to invade the American market by below-cost sales without any agreement on prices whatsoever. Also, the requisite intent to injure need not be included in the joint action, but presumably could be the independent intent of some or all of the parties acting in their individual interests.

The record in the *Matsushita* litigation unquestionably includes enough evidence to go to trial with respect to the two issues of dumping and injury to the American industry. With respect to intent, it seems obvious that the extent of the dumping found by the United States Government, as shown in the record, is itself evidence that the foreign manufacturers must have known that substantial injury to the U.S. consumer electronics industry would necessarily result. Thus, under the usual rules governing proof of intent in civil suits, it may be inferred that the foreign manufacturers "intended the necessary and direct consequences of their acts," *United States v. Patten,* 226 U.S. 525, 543; 33 S. Ct. 141, 145; 57 L. Ed. 333, 342 (1913). Indeed, "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *United States v. United States Gypsum Co., et al.,* 438 U.S. 422, 444; 98 S. Ct. 2864, 2877; 57 L. Ed. 2d 854, 874 (1978). In an action based upon a statute, the standard of intent may range from purpose and knowledge to recklessness or negligence, and may be established by the specific statute and be peculiar to it. E.g., *Turner v. United States,* 396 U.S. 398 90 S. Ct. 642, 24 L. Ed. 2d 610

(1970).[3] The record before the Court of Appeals contains extensive evidence of the foreign manufacturers' purpose to evade United States antidumping laws and evidence of the continuation of dumping after a Treasury Department finding of dumping and tariff commission finding of injury to a domestic industry. Thus, there is more than enough evidence as to the requisite intent, a trial is warranted, and summary judgment was inappropriate.

CONCLUSION

SIA urges the court to grant the petition for a writ of certiorari to review the issues, or otherwise to issue its mandate to the Court of Appeals to reinstate its prior decision under the Antidumping Act of 1916.

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[3] The standard applicable to the 1916 Antidumping Act has not yet been reviewed by this Court or the Court of Appeals. Constitutional requirements for criminal prosecution precluding a conclusive presumption which shifts the burden of proof to the accused have no relevance in this case.